

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARK MOSS, individually and on behalf of
the Mark S. and Ellen R. Moss Family Trust
and the Mark S. & Ellen R. Moss Charitable
Remainder Unitrust,

Plaintiff,

vs.

CHARLES J. MCLUCAS, et al.,

Defendants.

CASE NO. 12-CV-2368 BEN (KSC)

**ORDER DENYING EX PARTE
APPLICATION FOR
TEMPORARY RESTRAINING
ORDER AND REQUEST TO
CONDUCT LIMITED EXPEDITED
DISCOVERY**

[Docket No. 23]

Presently before the Court is Plaintiff's Ex Parte Application for Temporary Restraining Order and Limited Expedited Discovery Related Thereto. (Docket No. 23.) For the reasons stated below, the Ex Parte Application is **DENIED**.

BACKGROUND

Plaintiff Mark Moss allegedly invested more than \$1 million of his retirement funds in a general investment with Kingsway Sales and Marketing, LLC and its successor, Kingsway Industries, Inc. (collectively, "Kingsway") based on the advice and counsel of Defendant Charles McLucas, Plaintiff's long-time investment advisor and certified public accountant. (Compl. ¶¶ 16-19; Moss Decl. ¶ 5.) Plaintiff alleges that McLucas used his position of trust and confidence with Plaintiff to assure him that his investments in Kingsway were "lucrative," "safe," and "guaranteed." (Compl.

1 ¶¶ 16-18; Moss Decl. ¶ 5.)

2 McLucas allegedly knew that Defendant David Mahrt, the owner of Kingsway, and his family
 3 were using large amounts of Kingsway's working funds for personal use as well as seeking loans from
 4 new investors to pay off previous investors and pay personal expenses. (Compl. ¶¶ 31-32; Moss Decl.
 5 ¶ 7.) Plaintiff alleges that McLucas wrongfully received Plaintiff's investment funds. (Compl. ¶ 32;
 6 Moss Decl. ¶ 7.)

7 On September 28, 2012, Plaintiff initiated the present action. The complaint asserts nine
 8 claims: (1) securities fraud pursuant to 15 U.S.C. § 78j and 17 C.F.R. § 240.10b-5 against McLucas
 9 and Mahrt; (2) common law fraud and deceit against McLucas and Mahrt; (3) breach of fiduciary duty
 10 against McLucas and Yosemite Capital Management; (4) professional negligence against McLucas
 11 and Yosemite Capital Management; (5) constructive fraud against McLucas and Yosemite Capital
 12 Management; (6) constructive trust against Yosemite Capital Management and Charitable Trust
 13 Administrators, Inc.; (7) conversion against McLucas and Mahrt; (8) violation of California Welfare
 14 & Institutions Code §§ 15600 *et seq.* against McLucas; and (9) violation of Business and Professions
 15 Code §§ 17200 *et seq.* against Mahrt and McLucas.

16 McLucas is the president of Defendant Charitable Trust Administrators, Inc. ("CTAI").
 17 (McLucas Decl. ¶ 2.) From 2003 to September 2012, McLucas owned a 50% ownership interest in
 18 CTAI, and currently, McLucas owns a 100% ownership interest in CTAI. (*Id.* ¶¶ 2, 14.) On
 19 November 19, 2012, Plaintiff received a bulk email from CTAI—the September 2012 Charitable
 20 Times Quarterly Newsletter. (Moss Decl. ¶ 10.) An article titled "Firm Announcement: Introducing
 21 Renaissance Administration," written by McLucas, stated that CTAI was transferring all of its
 22 charitable trust administration services to a third party, Renaissance Administration, LLC. (*Id.*, Exh.
 23 3.) Plaintiff alleges that he "heard from other people who know McLucas that he sold his charitable
 24 trust administration business to Renaissance." (*Id.* ¶ 10.) Plaintiff alleges that subsequent
 25 investigation confirmed that McLucas sold CTAI to Renaissance. (Wisdom Decl. ¶ 3; Wypychowski
 26 Decl. ¶ 3.) According to Plaintiff, "[t]he timing of the sale of CTAI is suspicious, and it appears that
 27 McLucas and CTAI are currently liquidating assets in order to avoid recovery by Dr. Moss." (Ex Parte
 28 Appl. at 3.)

1 Presently before the Court is Plaintiff's Ex Parte Application for Temporary Restraining Order
 2 and Limited Expedited Discovery Related Thereto. Plaintiff seeks a temporary restraining order
 3 enjoining McLucas and CTAI from directly or indirectly transferring, liquidating, encumbering,
 4 pledging, assigning, or otherwise disposing of any and all proceeds from the sale of CTAI to
 5 Renaissance.

6 **DISCUSSION**

7 **I. TEMPORARY RESTRAINING ORDER**

8 To obtain a temporary restraining order ("TRO"), a plaintiff must demonstrate "that he is likely
 9 to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,
 10 that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*
 11 *v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). An injunction is "an extraordinary remedy
 12 that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 21.
 13 The determination whether to grant an injunction is "an exercise of judicial discretion, and the
 14 propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556
 15 U.S. 418, 433 (2009) (internal quotation marks omitted).

16 Plaintiff's request for a TRO is based on the premise that "[t]he timing of the sale of CTAI is
 17 suspicious, and it appears that McLucas and CTAI are currently liquidating assets in order to avoid
 18 recovery by Dr. Moss." (Ex Parte Appl. at 3.) According to Plaintiff, CTAI is no longer conducting
 19 business because it has been completely sold to Renaissance. (*See id.* at 7.)

20 Plaintiff, however, has not met his burden in establishing that McLucas and CTAI are
 21 liquidating assets to avoid recovery by Plaintiff. First, there is evidence that CTAI was not sold in its
 22 entirety and that it is still conducting business. McLucas testified that on September 20, 2012, "I sold
 23 only the internal tax preparation and trust administration components of CTAI to Renaissance
 24 Administration, LLC . . . , but NOT the company itself." (McLucas Decl. ¶ 13.) "CTAI was and
 25 remains a viable business entity that has not been sold to any third party." (*Id.* ¶ 4.) The Charitable
 26 Times Quarterly Newsletter, which Plaintiff alleges alerted him to the sale of CTAI, confirms this.
 27 The Newsletter states:

28 I [McLucas] am excited to announce some big changes in our firm that will be effective

1 October 1, 2012. At that time, we will be transferring all of our *charitable trust*
 2 *administration services* to Renaissance Administration, LLC. For our clients, you will
 3 continue to receive the same high level of services that you have come to expect
 4 through CTAI, at the same fee, with additional resources and service capabilities that
 5 Renaissance offers.

6 (Moss Decl., Exh. 3 (emphasis added).) The Newsletter is consistent with McLucas' testimony, in that
 7 it confirms that only the charitable trust administration services were sold to Renaissance and that
 8 CTAI remains a viable business entity. Although Plaintiff argues that he heard from other individuals
 9 who know McLucas that McLucas sold CTAI (*id.* ¶ 10), the more reliable evidence indicates that
 10 CTAI was not sold in its entirety and is continuing its business operations.

11 Second, there is evidence that McLucas still owns an interest in CTAI. McLucas testified,
 12 "[w]ith 50% of the proceeds from the Sale, I actually purchased back the other 50% ownership interest
 13 in CTAI that had previously belonged to HMWC partners. Not only did I not sell CTAI, but I now
 14 own ALL of it." (McLucas Decl. ¶ 14.) This testimony is confirmed by the Newsletter, which
 15 emphasizes McLucas' continued role in CTAI:

16 As for my continued role [after the sale], I will be available for face-to-face meetings
 17 with charities and individuals to review proposals and answer questions when
 18 establishing a charitable trust. For the past 17 years, my heart and passion for CTAI
 19 has been to provide individuals and smaller non-profit organizations, churches and
 20 fellow professionals with technical expertise and state-of-the-art illustrations and
 21 proposals, in order to assist in establishing charitable trusts and other forms of planned
 22 gifts. Transferring my administrative duties and responsibilities to Renaissance will
 23 free my time to focus on those activities. Through my new association with
 24 Renaissance, I will train and educate professionals and charities in new planned gifts
 25 assisted by a strong team of highly professional industry experts.

26 (Moss Decl., Exh. 3.) Although Plaintiff disputes this, the more reliable evidence indicates that
 27 McLucas still owns an interest in CTAI.

28 Plaintiff has not met his burden in establishing that McLucas and CTAI are liquidating assets
 29 to avoid recovery by Plaintiff. As this issue is dispositive, the parties' remaining arguments need not
 30 be addressed. Plaintiff's request for a temporary restraining order is **DENIED**.

II. REQUEST FOR LIMITED EXPEDITED DISCOVERY

31 A court may authorize expedited discovery where an applicant demonstrates good cause.
 32 *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275 (N.D. Cal. 2002). Good cause exists

1 "where the need for expedited discovery, in consideration of the administration of justice, outweighs
2 the prejudice to the responding party." *Id.* at 276.

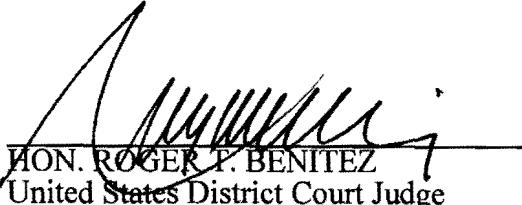
3 Because Plaintiff has not met his burden for the issuance of a temporary restraining order, his
4 request for limited expedited discovery is **DENIED**.

5 **CONCLUSION**

6 For the foregoing reasons, Plaintiff's Ex Parte Application for Temporary Restraining Order
7 and Limited Expedited Discovery Related Thereto is **DENIED**.

8 **IT IS SO ORDERED.**

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10 DATED: December 18, 2012

11 
12 HON. ROGER T. BENITEZ
13 United States District Court Judge

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